John P. Scripps Newspaper Corp. d/b/a the Sun *and* Communications Workers of America, Local 14671, AFL-CIO, Petitioner. Case 19-UC-596

September 30, 1999

# DECISION ON REVIEW AND ORDER CLARIFYING UNIT

By Chairman Truesdale and Members Fox, Liebman, Hurtgen, and Brame

The single issue on review is whether the Employer newspaper's Creative Services department employees should be added to the existing unit of employees performing composing room work through the Petitioner's unit clarification petition. Having carefully examined the record in light of the Petitioner's request for review and the Employer's opposition brief, we conclude that Creative Services employees should be added to the existing unit of employees performing composing room work. Accordingly, we shall clarify the unit to include them.

### Background

The facts are for the most part undisputed. The Union-Petitioner historically has had a series of collective-bargaining agreements with the Employer that described the unit as follows:

Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective-bargaining unit consists of all employees performing any such work.

During negotiations for a successor agreement to the 1984 to 1987 bargaining agreement, the Employer proposed modification of the jurisdiction provision. It sought to delete the last clause which states, "and the appropriate collective-bargaining unit consists of all employees performing any such work." Impasse on the Employer's proposal to modify the jurisdiction clause was reached on August 22, 1990.

On May 28, 1993, the Board found that the Employer violated Section 8(a)(5) of the Act by insisting to impasse on modification of the jurisdiction clause which effectively would have removed any meaningful unit definition from the collective-bargaining agreement. Bremerton Sun Publishing Co., 311 NLRB 467, 470

(1993). Bremerton Sun was the companion case to Antelope Valley Press, 311 NLRB 459 (1993), in which the Board held that when previously agreed-on bargaining unit descriptions are based on descriptions of work performed,

an employer may, after reaching impasse, insist on transferring work of a type contained within the description to employees other than those currently performing it. The employer may not, however, either change the unit description itself or insist that nonunit employees to whom the work is transferred will remain outside the unit. The unit placement of such employees may be determined by the Board either in an unfair labor practice proceeding or a unit clarification proceeding.

Bremerton Sun Publishing Co., 311 NLRB at 470–471.

Subsequently on February 3, 1994, the parties signed a successor bargaining agreement effective from March 1, 1987, through February 28, 1999, which continued the historical jurisdictional clause. In the meantime, during 1990, the Employer established the Creative Services classification at issue to perform a variety of functions, including creating, with the aid of computer programs, original art work, working with ad sales persons in preparing ads, and completing print ready ads. The instant petition, filed by the Union on October 2, 1995, is the unit clarification proceeding contemplated in Antelope Valley Press, in which the Board must determine whether the "nonunit employees to whom the work [was] transferred [the Creative Services employees] will remain outside the unit." Bremerton Sun Publishing Co., 311 NLRB at 470.

# Composing Room Employees

The employees who most clearly perform the functions that are defined in the unit description are the Composing Room employees, and the parties have always treated the Composing Room employees as being in the bargaining unit. For shorthand purposes only, we shall refer to the unit as it is currently comprised as the "Composing Room employees." Composing Room employees are responsible for putting all the elements of the newspaper into its final format for printing-including editorial (news) content, want ads, and advertisements. Although Composing Room employees have had to adapt the way they perform their jobs to changing technology, their fundamental responsibility of fitting items on a page and the pages of the paper together has not changed. This case involves the Composing Room employees' preparation of advertisements for the press; their preparation of editorial content and want ads is of little relevance to this proceeding.

The advertising department is responsible for selling ad space and for drafting ads to send to the Composing

<sup>&</sup>lt;sup>1</sup> On November 29, 1995, the Regional Director issued a decision dismissing the Union's petition to clarify the unit. On January 24, 1996, in accord with Sec. 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner-Union filed a timely request for review contending that the Regional Director should have clarified the unit to include the Creative Services employees in the existing unit, and on January 11, 1996, the Employer filed a request for partial review contending that the clarification petition was untimely. By Order dated August 4, 1997, the Board granted the Union's request for review and denied the Employer's request for partial review. On September 4, 1997, the Employer filed a brief on review.

Room for final preparation. The advertising department typically sends ads to the Composing Room using layout sheets, which direct, with varying degrees of detail, the artwork and the text to be included in the ads. Some ads (mostly national) are sent to the Composing Room in final format, which the Composing Room employees need only place within the paper; some are sent with complete art work and handwritten copy, to which the Composing Room employees need only type in the words and otherwise prepare for insertion into the newspaper; and others are sent with rough layouts, to which Composing Room employees need to insert artwork, background, borders, shading, color, and text. Because ads are sold by size, Composing Room employees do not determine the size of an ad, but they may need to decide how many columns to use and how best to accommodate the art work and the text of the ad to the size of the ad.

The Composing Room employees use computer programs in preparing ads. As of the time of the hearing in this case, they principally used programs referred to as "Multi Ad" and "Quark Xpress." For those ads in which art or photographs are furnished, they use scanners to enter the art into the computer. Otherwise, they use art or photographs from a number of Compact Disks (CDs).<sup>2</sup> In either circumstance, they must manipulate the art to size it to the ad; add shading, background, and color; combine various images or pieces of images and fade the pieces in or out; and add logos or other details. One Composing Room witness estimated that layouts specify what art to use "probably 50 percent of the time."<sup>3</sup>

Text for ads generally is supplied. As with art, instructions about text vary. The instruction could be to copy text from a prior ad, to modify prior text, or the text could be handwritten on the layout. The size of headings is generally indicated by the size of the handwriting or by drawing two parallel lines. A layout for an ad might specify that the headline should be large bold, but the Composing Room employee working on the ad would have to decide which among 130 different fonts to use. Although the layouts specify what color to use, Composing Room employees sometimes override the direction because they know it will not work. The content of the text typically is directed in the layout, but at times the direction may be to make it "exciting." On other occasions, Composing Room employees might deviate from the specified text to make it better fit into the ad, either for spatial or content reasons. In any event, Composing Room employees are responsible for putting the text into the ad copy.

Composing Room employees also have prepared speculative ads for salesmen to sell to potential customers. The layout sheets for spec ads often are sent to the Composing Room with only generalized or minimal directions. Composing Room employees, using their available tools, are often called on to exercise their discretion in creating spec ads. Because the first priority of Composing Room employees is to prepare copy for printing in the paper, spec ads are worked on when time allows.

Composing Room employees also prepare special advertising inserts called "tabs." Tabs include weekly, seasonal, and special inserts and such items as promotional inserts for shopping malls with ads for most or all of the stores in the mall, automotive sections, and spring home fix-up. At times, tabs include spec ads, such as ads for a particular store in a shopping mall. Some tabs contain "editorial" content, i.e., general promotional material printed as if it were news. The editorial content may be prepared by the Composing Room employees using (and perhaps modifying) "canned" material taken from compact disks, or it may be supplied by freelance writers.

Composing Room employees' ad work is closely coordinated with the advertising employees. Although ad employees typically send ads to the Composing Room in written form on layouts, they have also orally conveyed ads to Composing Room employees. Composing Room employees have frequent, daily conversations with ad employees, either face to face or over the phone, about the content of ads. Composing Room employees sometimes work directly with ad sales persons to determine what the ad should contain. After an ad is made press ready, Composing Room employees generally send the ad copy to the sales employees for approval, and sales employees at times refer the ad to the advertiser before final approval is given.

Composing Room employees occasionally work directly with nonemployees in developing an ad. One of the Union-Petitioner's witnesses testified without contradiction and in detail how she worked with a freelance writer in preparing tabs. The process as she described it was a cooperative effort. The Composing Room employee used the computer to manipulate such matters as where a picture should go, and she and the freelancer would go back and forth until they reached a consensus. A 20-page tab, such as they worked on, would take 2 full working days to complete.

The Composing Room employees have been and are able through the use of computers and CDs to compose the great variety of ads typical to a daily newspaper, and much of what they do involves creative judgment. The Creative Services supervisor testified that deciding what font to use, the spacing of type, the ad's border, and "any part of an ad, with the exception of specific language,

<sup>&</sup>lt;sup>2</sup> The artwork available on CDs is referred to as "clip art." For example, the CDs have pictures of all the latest makes and models of automobiles and other motor vehicles. When clip art is called for, the ad layouts generally refer to an index number specifying what to use.

<sup>&</sup>lt;sup>3</sup> It is unclear whether the estimate referred to all ads or only to spec ads and tabs.

<sup>&</sup>lt;sup>4</sup> So named because of their tabloid size.

meaning whether it says the word 'the' or the word 'it,' I consider to be a creative process." Under this definition, the Composing Room employees' manipulation of artwork and text also is creative. Advertisements take up a significant portion of every edition of the newspaper, and needless to say, provide a major source of revenue for the paper. Ultimately, no ad gets into the newspaper without going through the Composing Room.

#### Creative Services Employees

The advertising department has used artwork submitted by the advertisers, clip art from flip charts and more recently from CDs,<sup>5</sup> and original artwork furnished by freelance graphic artists. In 1990, the Employer established the position of Creative Services employees within the advertising department to perform a variety of functions, including creating with the aid of computer programs original art work, working with ad sales persons in preparing ads, and completing print ready ads. At the time of the hearing, the Employer had two employees and a working manager in the position.<sup>6</sup>

Creative Services was set up as a separate department within the advertising department. Creative Services employees' line of supervision extends through Creative Services' immediate supervisor to the advertising director; Composing Room employees are supervised by the production director. Creative Services employees work on the third floor where advertising employees also work; the Composing Room is in the basement. While there are no transfers or interchanges among Creative Services and Composing Room employees, there is frequent daily work-related contact, both over the telephone and in person, between the employees in the two depart-Creative Services employees work one 8-hour ments. shift; Composing Room employees, two 7-hour shifts; Creative Services employees receive the same fringe benefits as other nonunit employees; Composing Room employees receive contractual benefits. Composing Room employees receive higher pay.

Brenda Harford, the Creative Services supervisor, testified:

What the primary function of my department is to gather information through a sales rep, be it something that an account has specifically asked for, or be it something that the sales rep has determined may be a manner in which we could sell an ad to them. Information is given to us in varying degrees, from something very sketchy, as just create something for me, up until more detail which might tell us specifically that they

need three cars and, you know, here is the kind of the odd [sic] copy that is going to be in it and so forth. We interpret that information by adding to it, basically creating. We are working from a blank space.

According to the Creative Services supervisor, the majority of ad requests come from sales representatives on design specifications, i.e., ad specs. Ad specs, as with ad layouts used by Composing Room employees, vary in the amount of detail provided. Although ad specs may have a simpler layout and may be somewhat less detailed than the ad layouts Composing Room employees get from the ad sales representatives, ad specs serve the same function as ad layouts—to convey to the employees how ads should be constructed.<sup>8</sup>

The Creative Services supervisor testified that a standard ad spec would tell employees the name of the account and when it was due, the ad type, the product, the ad size, color specifications, if the advertiser had any specific headline or theme in mind, whether it is a new ad or a redesign, what sort of art (sometimes supplied) to include, and any other instructions the advertiser might have. Creative Services employees must use their judgment and discretion in how best to implement the ad spec's directions and in modifying such matters as suggested themes, wording, and use of art.

Art may be specified by an advertiser or a sales representative, suggested through examples, or left for the Creative Services employees to furnish following the specified theme of the ad. For example, Creative Services employees may electronically receive a photo for an ad or may be requested to pull clip art off a CD. Creative Services adjust the art for size, add background, rearrange it, add shading, and choose type fonts. Creative Services employees use the Multi Ad Creator to make such manipulations. Creative Services employees, unlike Composing Room employees, use the Adobe Illustrator computer program to create freehand graphic art. 10 The Creative Services supervisor testified that only about 5 percent of ads contain original line drawings, and that if business logos and freehand type faces are included, up to 15 percent of Creative Services employees' work is freehand art.

The spec sheet generally furnishes the text to be used but may not indicate how it should be put into the final

<sup>&</sup>lt;sup>5</sup> At one time the Employer had graphic artists within the advertising department, but that practice was discontinued and the Employer began using freelance artists as needed.

<sup>&</sup>lt;sup>6</sup> The parties stipulated that Brenda Harford, the Creative Services manager, is a statutory supervisor.

<sup>&</sup>lt;sup>7</sup> The record does not describe the length of or provide details about the nature of such contacts.

<sup>&</sup>lt;sup>8</sup> Thus, the Creative Services supervisor's testimony that Creative Services employees work from "a blank space" is not supported by evidence about the details of Creative Services employees' work.

<sup>&</sup>lt;sup>9</sup> This is the same program used by Composing Room employees to similarly manipulate both furnished and clip art. The Creative Services director described Multi Ad as "basically a graphics program . . . an ad building program."

<sup>&</sup>lt;sup>10</sup> The Creative Services director testified that Adobe Illustrator "is not a graphic design program in terms of putting together an ad. It is specifically for the use of creating or manipulating artwork. You can draw in there, you can paint in there, you can create headlines in there, however, I would not use that to build an ad in."

ad. Creative Services employees use computer programs such as Multi Ad to manipulate text.

Creative Services employees also design spec ads and tabs. In preparing such ads Creative Services employees at times work directly with the clients. For example, the Creative Services supervisor testified about her role in preparing the Kitsap Mall tab:

I am directly involved with the marketing director from the mall, in which we sit down and discuss what we are going to talk about in editorial content, the manner in which we are going to show the art work. I also art direct along those lines, I hire a photographer to create the art that we are actually going to show in the tabloid.

. . . .

I directly contact the accounts and discuss with them what I want to show. I go out and pick out the product, determine what the backgrounds or whatever is going to look like.

Creative Services employees have less direct contact with customers than the supervisor. The majority of spec ads come from the sales department on ad specs, which give instructions from vague to detailed. For example, Creative Services received a spec form from the ad department for the Federal Credit Union at Kitsap Mall which specified the date the ad was needed, that it was a display ad of 64-1/2 inches to run in a special section, that it was to run in black, that it was a new ad, that an included example should be used as an idea of how to compose the ad, that the copy on the example should be followed but something more exciting should be made, and that some room should be left for rates. <sup>11</sup>

#### Legal Standards

Typically, the Board looks to various factors in determining whether a new group of employees should be added to an existing bargaining unit through unit clarification or other representation proceedings. Great A & P Tea Co., 140 NLRB 1011 (1963). Among the factors considered are compensation, work hours, supervision, qualifications, skills, training, job functions, location, work contact, integration, interchange, and bargaining history. Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962). The Board also looks to the role of the new employees in relationship to the operations of the existing unit. Granite City Steel Co., 137 NLRB 209 (1962). Although the Board generally weighs a variety of community-of-interest factors in deciding unit clarification proceedings, "in some cases the Board gives greater weight to some factors than to others and, indeed, the presence or absence of a particular factor may be crucial." Great A & P Tea Co., supra at 1021. In assessing the common interests that new employees share with unit employees, the Board obviously must take account of the scope of the existing unit in determining whether the new employees should be included in the unit.

Where, as here, the scope of a unit is defined by the work performed, it is necessarily that scope which is central to the Board's analysis, and the Board and the courts have accorded special significance to that unit scope. As stated, both Antelope Valley Press, supra, 311 NLRB 459, and Bremerton Sun, supra, 311 NLRB 467, involved bargaining units defined in terms of work performed. In Antelope Valley, the Board held that the employer did not violate the Act by bargaining to impasse over its right to take advantage of new technology to transfer unit work to nonunit employees so long as the employer did not preclude the union from contending in a subsequent proceeding, such as a unit clarification proceeding, that the employees using the new technology should be included in the existing unit because they are performing unit work. Specifically, the Board held that "a union is entitled to take the unit description as given" (311 NLRB at 461) and that:

If the employer does not insist on changing the unit description, however, but seeks an addition to that clause that would grant it the right to transfer work out of the unit, we will find the employer acted lawfully provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit [footnote omitted]. Under this approach, the employer will be able to take advantage of new technology, but will not be able to decide, unilaterally, questions regarding the scope of the unit. [Emphasis added; Antelope Valley Press, 311 NLRB at 461.]

Because Antelope Valley Press did not insist on changing the unit description or deny the union the right to assert that the individuals to whom unit work might be assigned were unit members, the Board found that Antelope Valley Press did not violate the Act. In contrast, in Bremerton Sun, supra, the Board found that the employer violated the Act by insisting that any unit placement determination be made according to a standard that would alter the existing unit, which was described according to the work performed by unit employees. Neither Antelope Valley nor Bremerton Sun decided how the Board should determine unit placement issues.

This is the first unit clarification proceeding involving a unit described by the work performed by unit employees which has arisen since the issuance of *Antelope Valley* and *Bremerton Sun*, supra. Several prior cases, however, give substantial guidance on how these matters should be decided. In *Bay Shipbuilding Corp.*, 263

<sup>&</sup>lt;sup>11</sup> Compare to the similar role Composing Room employees have performed in putting together spec ads.

<sup>&</sup>lt;sup>12</sup> The employer and unit there were the same as in this case.

NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983), involving a unit described as all production and maintenance employees working within the union's jurisdiction, the Board found that the employer had the right to establish a new department and to transfer unit employees to the new department. But, the Board adopted the judge's conclusion that the employer violated the Act by excluding from the unit the manual lofting employees transferred from the unit to the new computer lofting position. The judge concluded:

that Respondent does not have the right to simply designate that [transferred] group henceforth as nonunion, but rather Respondent has the burden of showing that the group is sufficiently dissimilar from the remainder of the unit so as to warrant its removal.

## The judge explained:

[T]here is no doubt that there have been changes in the job duties and tasks of the affected employees. Nevertheless, the similarities between the work performed by these employees before and after the changes . . . far outweigh the differences effected by those changes. The function of loftsmen in both manual and computer lofting is identical and the differences arise only in the manner in which this function is carried out.

In enforcing the Board's Order, the court found:<sup>14</sup>

This obligation [of the employer to bargain] does not expire automatically when technological innovations affect the jobs of some employees in the unit. Rather the employer's obligations depend on whether the changes in the job structure are so significant that the existing bargaining unit, including the affected employees, is no longer appropriate.

Subsequently, in United Technologies Corp., 287 NLRB 198, 204 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989), the Board held that the employer unlawfully refused to bargain over a decision to exclude a new classification, production control coordinator (PCC), from the bargaining unit. The unit previously included expediters whose basic function was to keep track of inventory and follow parts through the plant. The employer implemented a new system of inventory and production control which involved the elimination of the expediters and the employment of PCCs. Although the function of the PCCs "coincided precisely" with the function of the unit expediters, the employer announced that the PCCs would not be bargaining unit employees. In finding the violation, the administrative law judge stated that the "Respondent has not met its burden of showing that the PCC position was so different from the expediter job as to justify its exclusion from the bargaining unit"; what differences there are "flow directly from the improved methodology and increased efficiency brought on by the computer technology." In enforcing this aspect of the Board's decision the court held (884 F.2d at 1572):

An employer seeking to remove positions from a bargaining unit has the burden of showing sufficient dissimilarity so as to warrant their severance. Technological change that affects jobs within the unit does not relieve the employer of its duty to bargain. [Citations omitted.]

In *Illinois-American Water Co.*, 296 NLRB 715 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991), the union represented employees such as customer service clerks and entry clerks. The employer unilaterally installed a computer information center to track customer information, transferred a number of unit employees to the computer center, and announced that the bargaining agreements would not cover the computer center employees. The computer center employees performed work that had previously been done by unit employees. The administrative law judge described the "ultimate issue to determined as" (296 NLRB at 720–721):

whether the changes in job structure of employees in the two groups [computer group and bargaining group] has produced a situation wherein a bargaining unit composed of both groups would be inappropriate. Phrased differently, do the computer center clerical employees enjoy sufficient community of interest with East St. Louis bargaining unit employees to be included in the unit?

The Board adopted the judge's concluding findings:

In sum, the similarities between the computer group and the bargaining unit group are such that I find the clerical employees in the computer group enjoy sufficient community of interest with the employees in the East St. Louis bargaining unit to be includible in the unit. I am satisfied the bargaining unit which existed prior to the changes is still a viable unit, and that Respondent has failed to show that the computer group is sufficiently dissimilar from the bargaining unit group so as to warrant Respondent's removal of the computer group from the East St. Louis bargaining unit. [Citation omitted. Id. at 721.]

In enforcing the Board's decision, the court held (993 F.2d at 1375):

As [the court's decision] in *Bay Shipbuilding* explains, "[t]his [bargaining] obligation does not expire automatically when technological innovations affect the jobs of some of the employees in the unit. Rather the employer's obligations depend on whether the changes

Lofting involves a type of patternmaking for building ship hulls.
NLRB v. Bay Shipbuilding Corp., 721 F.2d 187, 190 (7th Cir. 1983).

in job structure are so significant that the existing bargaining unit, including the affected employees, is no longer appropriate." Id. When such changes occur, the burden is on the employer to show "sufficient dissimilarity" to warrant severance from the bargaining unit. The Board found that Illinois-American failed to sustain that burden. After reviewing the facts, we find that the Board's decision is supported by substantial evidence. [Citations omitted.]

We recognize, as our dissenting colleagues argue, that Bay Shipbuilding, United Technologies, and Illinois-American, unlike this case, were unfair labor practice cases involving the transfer of employees from the unit. While not dispositive of the issues presented here, these cases are nonetheless clearly analogous and provide useful guidelines for our analysis. Each of these cases involved functionally described units. In each, the employers created new job classifications which involved the performance of unit work. The issue presented was whether the new jobs were sufficiently dissimilar from the jobs performed by unit employees to justify the employer's removal of the work from the unit. That is precisely the issue presented here. Although the Employer in this case has not removed people from the current unit, it has removed work by creating new job classifications that clearly involve the performance of unit work, just as in those unfair labor practice cases. Thus, the principles that guided the Board and the courts in those cases in deciding whether the new positions were unit positions are clearly relevant to resolving the analogous issue in this case. In fact, in Bay Shipbuilding, the court said "Clarification of the unit through the unfair labor practice proceeding was . . . entirely appropriate." NLRB v. Bay Shipbuilding, supra, 721 F.2d at 191. Thus, it is to the principles of these cases to which we turn to determine the appropriate standards to be applied in analogous representation proceedings.

Accordingly, we shall apply the following standard in unit clarification proceedings involving bargaining units defined by the work performed: If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate.

In determining whether the presumption has been rebutted, we will consider community-of-interest factors that relate to changes in the nature and structure of the work. As discussed above, however, a showing that technological innovation has affected unit work will not suffice to exclude new classifications performing that work from the unit unless the work has changed to such an extent that the unit would no longer make sense if it included the disputed employees. Thus, the presumption will apply if the only significant differences in the work performed "flow directly from the improved methodology and increased efficiency brought on by computer technology." *United Technologies*, supra, 287 NLRB at 204.

Further, reliance on community-of-interest factors that are solely within the employer's control would usually not be appropriate to rebut the presumption. For example, reliance on differences in wage rates between existing unit employees and employees sought to be included would be misplaced. Wages of unit employees, of course, are subject to negotiations, which necessarily do not control wages of nonunit employees. Any resulting disparity should not provide a separate basis for continuing to exclude employees from the unit when those employees now perform work covered by the unit description. To permit reliance on factors that an employer can manipulate in an effort to exclude employees from the unit would be a "patent form of circular reasoning." <sup>16</sup> We recognize that the burden we impose to show sufficient dissimilarity is a substantial one, but we believe it is both appropriate and necessary to protect the integrity of the bargaining unit the parties have agreed to.<sup>17</sup>

<sup>&</sup>lt;sup>15</sup> For example, news reporters' use of computers to prepare nearly press-ready copy would be an incidental consequence of the introduction of new technology to the pressroom and would not change their basic work.

<sup>&</sup>lt;sup>16</sup> Oxford Chemicals, Inc., 286 NLRB 187, 188 fn. 5 (1987). See also Austin Cablevision, 279 NLRB 535, 537 (1986).

The Employer cites two cases in which the Board applied a community-of-interest standard to determine whether certain employees should be accreted to a unit described solely according to the work being performed. Cannon Air Conditioning, 252 NLRB 556, 561 (1980); Scrantonian Publishing Co., 215 NLRB 296, 298 fn. 6 (1974). It argues that application of any other standard would be inconsistent with the holdings of those cases. Although the Board applied a community-of-interest test in Cannon Air Conditioning, the result reached would not necessarily vary under the standard announced today. After comparing the work of the employees at issue and the employees in the bargaining unit, the Board found that there was "almost no community of interest whatever" between the two groups of employees. Id., 252 NLRB at 561. Thus, even if the employees at issue performed unit work as defined in the unit description, and even under the standard we have set forth in this case, the presumption that they should be included in the unit arguably would be rebutted. In Scrantonian Publishing, there were two units which arguably encompassed the work performed by the employees at issue. The Board held that the employees were not an accretion to either unit. Id., 215 NLRB at 298. The case before us presents no issue of rival union claims.

In any event, both Cannon Air Conditioning and Scrantonian Publishing preceded Antelope Valley Press and Bremerton Sun, supra, and we have formulated the rule we announce today to address the unit clarification issues that were left open by those decisions. In light of those two decisions, we have defined the standard to be used in unit clarification cases where the unit is described according to the work performed, including the role of community-of-interest factors in mak-

We acknowledge, as our dissenting colleagues point out, that the standard we announce today is different from the accretion standard set forth in the cases which they cite. See, e.g., Compact Video Services, 284 NLRB 117, 119–120 (1987); Safeway Stores, 256 NLRB 918 (1981). The analytical framework of those cases is, however, ill-suited to determining unit placement issues in cases involving functionally described units. As we have said, whether a unit is to be clarified to include certain employees initially turns on the scope of that unit, no matter how it is described. What our dissenting colleagues lose sight of is the critical distinction recognized in Antelope Valley and Bremerton Sunwhich is posed by cases where the unit is described, not according to the people in it, but, as here, according to the work performed. That distinction is central to, and necessarily frames, the resolution of the unit clarification issue. By excluding from a functionally described unit individuals performing unit work because they do not share an "overwhelming community of interest" with existing unit employees, our colleagues would effectively re-write for the parties the unit description.

Importantly, the scope of this bargaining unit is not one we have imposed on the parties. Rather, it is one that they voluntarily agreed to and have incorporated in successive collective-bargaining agreements. To ignore it would undermine the integrity of both the bargaining process itself and the existing bargaining unit. Once a bargaining unit has been established, the statutory goal of "encouraging the practice and procedure of collective bargaining" (sec. 1 of the Act) requires adherence to that unit, absent mutual agreement by the parties to change it. "Adherence to a bargaining unit, once it is fixed, is central to Congress' purpose of stabilizing labor-management relations in interstate commerce." 18

As a final point, we disagree with our dissenting colleagues' assertion that, by departing from the Board's "traditional accretion analysis," we have failed to give due accord to the Section 7 rights of employees to select their own representative. By deciding that the disputed Creative Services Employees should be included in the bargaining unit, we have effectively treated them no differently than employees who are newly hired to fill unit vacancies and clearly must be included in the existing unit. Had the employer voluntarily created these new classifications as unit positions, the employees' Section 7 rights would not have been at issue. We fail then to see how our applying a unit clarification standard tailored to the specific bargaining unit presented here can be viewed as impairing Section 7 rights. In any unit clarification proceeding, employees who meet the standard for unit placement will not have a right to vote whether or not they wish to be represented by the union; they will just be included in the unit. As such, they, just like newly hired employees, will share the same Section 7 rights as existing unit employees, no more, no less.

### Analysis

Under the standard we announce today, the threshold legal issue in this unit clarification proceeding is whether Creative Services employees perform work within the unit as it has been defined by the parties themselves. In finding that Creative Services employees should not be added to the existing unit, the Regional Director focused on the unit as comprising Composing Room employees, or job classifications, rather than on the contractual description which "makes clear that the type of work performed defines who is in the bargaining unit." As discussed above, this distinction is critical to our analysis.

The unit description covers all employees who perform any work which "begins with the markup of copy and continues until the material is ready for the printing press [but excluding proofreading]." Creative Services employees, like the Composing Room employees, clearly perform work that is within that unit description. The Composing Room employees prepare the full gamut of material for the press, including editorial content, want ads, and advertising. Although much of their work may involve preparation of editorial content, nevertheless an important part of their job is, and always has been, the preparation of advertisements. The exact nature of this work varies according to the type and source of advertisements they are preparing. As detailed above, Composing Room employees perform functions on ads which differ depending on whether the ad is a layout drafted and sent over by the advertising department; whether it is a "speculative" or "spec" ad which they prepare for salesmen to sell to potential customers, based on skeleton instructions from the salesmen; or whether it is part of an advertising insert known as a "tab." The important point, however, is that all of this work fits within the description of the work that the parties agreed defined the bargaining unit.

Just as the preparation of advertisements is an important function of composing room employees' work, likewise, the preparation of print-ready advertisements is an important function of the Creative Services employees, indeed it is an integral part of their work. Necessarily, this means that they perform work functions that fall somewhere between "the markup of copy" and when "the material is ready for the printing press." The primary source of the ad copy that the Creative Services employees work on is ad specifications ("ad specs") supplied by sales representatives. The primary source of the copy that the Composing Room employees work on is layouts supplied by the same sales representatives. The purpose of the layouts and the ad specs, however, is the

ing unit placement determinations. To the extent that the cases cited by the Employer suggest a different standard, they are hereby overruled.

<sup>&</sup>lt;sup>18</sup> NLRB v. United Technologies Corp., supra 884 F.2d at 1572, citing Boise Cascade Corp. v. NLRB, 860 F.2d 471, 475 (D.C. Cir. 1988).

<sup>&</sup>lt;sup>19</sup> Bremerton Sun, supra, 311 at 469.

same, i.e., to convey information to both Composing Room and Creative Services employees as to how the ads should be constructed.

In her testimony, Creative Services supervisor Harford confirmed that, in composing advertisements, Creative Services employees are dependent on information received from sales representatives on ad specs. These ad specs are similar in form and function to the instructions Composing Room employees receive on the layout sheets. The details that Creative Services employees receive on the ad specs and the details the Composing Room employees receive on the layout sheets vary from nearly complete to minimal. Furthermore, both Creative Services and Composing Room employees use such computer programs as "Multi Ad" and "Quark Xpress" to build ads from instructions given to them. Given these facts, therefore, Member Brame, like the Regional Director, gives undue weight to Harford's statement that Creative Services employees work from a "blank space." 20 Clearly, the fundamental nature of the functions of both Composing Room and Creative Services employees, with respect to advertisements, is the same: to compose them using guidelines provided to them by employees in the advertising department, i.e., the sales representatives.

Composing room employees may perform a wider range of unit duties than do Creative Services employees. But that is immaterial to our analysis. What does matter is that Creative Services employees, like those in the Composing Room, perform many functions that involve preparing advertising material for the printing press, and that those functions are an integral part of their work and not merely incidental to any other extra-unit work that they may perform, or otherwise an insignificant part of their work. The record plainly sustains the finding that their primary job functions fit squarely within the description of the work that defines the bargaining unit.

We therefore find, in accord with the principles discussed above, that the Creative Services employees presumptively should be included in the existing unit. Once that has been shown, the burden shifts to the party seeking to exclude the employees to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit including the new group would no longer be appropriate. We find, for the reasons stated below, that the Employer has not met this burden.

Looking at traditional community-of-interest factors, we find that Composing Room and Creative Services employees share similar, if not equal, skills to produce essentially the same work product. Both Composing Room employees and Creative Services employees are involved in putting together or creating ads largely from

detailed instructions,<sup>21</sup> both groups are equally skilled in using computer software for designing ads, and the ads produced by one group cannot be distinguished from those produced by the other group. Creative Services employees may receive somewhat less detailed instructions on how to produce ads than do Composing Room employees, but both work primarily from instruction sheets.

In concluding that Creative Services and Composing Room employees "are fulfilling different functions," the Regional Director found that the Creative Services employees, in addition to composing display ads, "perform a function which in the past was performed by advertising salesmen using pre-computer age technology such as paper, pens, pencils, scissors, and glue." This finding refers to testimony about spec ads that the ad sales representatives themselves prepared by hand and Creative Services employees do by computer. While there is general testimony that the Creative Services department was set up to free ad sales representatives to spend more time on their primary function, namely selling ads, nonetheless the significant point is that composing spec ads is and always has been Composing Room work as defined in the unit description. And, it is and always has been a function that the Composing Room employees themselves have performed.<sup>22</sup> We therefore disagree with the Regional Director that they fulfill different functions.

Creative Services employees do have training and experience as graphic artists and the ability to create freehand art,23 but any such input into creating ads constitutes only a small percentage of the ad work they produce. Furthermore, their artistic role is at least in part a function of the more advanced computer technology that they regularly use. Likewise, the somewhat less detailed instructions they receive is largely a function of differences in the methodology or the manner in which they perform their job, including use of technology. These differences, however, do not change the fundamental character of their job duties or their primary function of making advertisements ready for insertion into the newspaper. Bay Shipbuilding Corp., supra, 263 NLRB at 1140. In short, evidence that Creative Services employees have artistic skills and sometimes use them does not suffice to show that they are sufficiently dissimilar from the Composing Room employees so that the existing

<sup>&</sup>lt;sup>20</sup> Harford testified as follows: "What the primary function of my department is to gather information through a sales rep. . . . [and] adding to it, basically creating. We are working from a blank space."

<sup>&</sup>lt;sup>21</sup> Although the Creative Services supervisor testified that Creative services employees work from a "blank space," that testimony is offset by her testimony that Creative Services employees receive the majority of their ad requests through ad specs which give specific instructions.

<sup>&</sup>lt;sup>22</sup> The Employer argues that display and spec ads were done in the past by employees outside of the composing room, and that there is no evidence that Creative Services employees are doing anything different than what artists or advertising salesmen did in the past. This argument does not negate the evidence that spec ads have always been prepared by composing room employees.

<sup>&</sup>lt;sup>23</sup> Freehand artwork had been done previously by freelance graphic artists.

unit, including Creative Services employees, is no longer appropriate.

In finding that Creative Services employees should not be included in the unit, the Regional Director also relied on such traditional community-of-interest factors as separate supervision, different terms and conditions of employment, different work situs, and lack of interchange. Because of these differences, he found that the Creative Services employees did not share an overwhelming community of interest with Composing Room employees. Under the standard we have announced today, however, the inquiry is instead whether, given these differences, the inclusion of the Creative Services employees in the existing unit would destroy the appropriateness of that unit.

None of these differences demonstrates that the nature and structure of the work performed has changed to such an extent that the existing bargaining unit—defined by the work performed—would no longer be appropriate if Creative Services employees were added. As set forth above, differences in wages and other terms and conditions are the result of collective bargaining. The other dissimilarities cited by the Regional Director—separate supervision, different work situs, lack of interchange are also insufficient to rebut the presumption that Creative Services employees should be included in the unit. Those factors are to some extent subject to collective bargaining. To the extent that they are not, they nevertheless do not involve such drastic changes in the nature and structure of the work being performed that a unit which includes the Creative Services employees with the Composing Room employees would be inappropriate.<sup>24</sup>

In short, Creative Services employees clearly perform unit work as set forth in the unit description, and that work is not an insignificant or incidental part of their functions. Further, none of the disparities in community-of-interest factors present in this case would render the existing unit inappropriate if Creative Services employees were included. Thus, we find, pursuant to the standards we have set forth in this case, that Creative Services employees are properly part of the unit, and shall accordingly clarify the unit to include them.

#### 2. Professional status

There remains for consideration the Employer's contention that Creative Services employees are professional employees within the meaning of Section 2(12) of the Act. In its posthearing brief, the Employer raised the contention that the Creative Services employees are professional employees within the meaning of Section 2(12)

of the Act, arguing that they have education and experience in graphic design and their work is predominantly intellectual and varied and involves the consistent exercise of discretion and judgment. In light of the dismissal of the unit clarification petition, the Regional Director found it unnecessary to address the issue.

Regardless of the Creative Services employees' education and the judgment they exercise, we find that their work is "more of an art than a profession," and that they fail to meet the strict standards for professional employees imposed by Section 2(12) of the Act. In particular, they do not meet the standards of Section 2(12)(a)(iv) requiring "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital." <sup>26</sup>

## ORDER CLARIFYING UNIT

The collective-bargaining unit is clarified to include creative services employees. <sup>27</sup>

MEMBER HURTGEN, dissenting.

I do not agree with the test enunciated by my colleagues. In essence, that test makes it relatively easy to add new employees to a represented unit, without the consent of those new employees. The test therefore operates to take away a fundamental Section 7 right, viz. the right to choose whether to be represented by a union.

The Employer created a new classification, called Creative Services. There is no contention, here or elsewhere, that the Employer violated the Act by creating that classification or by transferring some unit work to the employees in that classification. The only issue is whether the new employees hired into that new classification are to be forced into the extant bargaining unit.<sup>1</sup>

My colleagues have developed a very lenient test for such forced inclusion. That test is:

Accordingly, we shall apply the following standard in unit clarification proceedings involving bargaining units defined by the work performed: If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new em-

Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate bargaining unit consists of all employees performing any such work.

<sup>&</sup>lt;sup>24</sup> While factors such as separate supervision and different work situs might lead to the conclusion in an initial representation case that a unit including only Composing Room employees and excluding Creative Services is "an appropriate unit," that is not the relevant inquiry in this unit clarification proceeding.

<sup>&</sup>lt;sup>25</sup> Binghamton Press Co., 226 NLRB 808, 810 (1976) (in finding that a newspaper's photographers are not professional employees).

<sup>&</sup>lt;sup>26</sup> See *Express-News Corp.*, 223 NLRB 627 (1976) (in finding that journalists are not professional employees).

<sup>&</sup>lt;sup>27</sup> The unit is described as:

<sup>&</sup>lt;sup>1</sup> The cases cited by my colleagues are inapposite. See *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), *United Technologies Corp.*, 287 NLRB 198 (1987), and *Illinois-American Water Co.*, 296 NLRB 715 (1989). Those cases involve unfair labor practice findings that the employers unilaterally transferred unit employees into assertedly new positions and then claimed that there was no obligation to bargain with respect to those employees.

ployees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate.

In addition, my colleagues say that "the burden we impose to show sufficient dissimilarity is a substantial one." Finally, my colleagues say:

Reliance on community of interest factors that are solely within the employer's control would usually not be appropriate to rebut the presumption.

My colleagues have turned extant principles on their head, thereby depriving employees of their Section 7 rights. Under extant principles, a substantial burden is imposed on the party who seeks to include employees without their consent. "The Board has followed a restrictive policy in finding accretion because it foreclosed the employee's basic right to select their bargaining representative." Towne Ford Sales, 270 NLRB 311 (1984); Melbet Jewelry Co., 180 NLRB 107 (1970). See also Giant Eagle Markets, 308 NLRB 206 (1992).

This substantial burden finds expression in the test historically used by the Board. The Board has said that it would add employees to a bargaining unit without their consent "only when the additional employees have little or no separate group identity . . . and when the addition employees share an overwhelming community of interest with the pre-existing unit to which they are accreted." *Safeway Stores*, 256 NLRB 918 (1981), cited with approval in *Compact Video Services*, 284 NLRB 117, 119–120 (1987).

The majority acknowledges that their standard is different from the traditional accretion standard set forth in the cases which I cite. However, the majority asserts that the traditional standard is "ill suited to determining unit placement issues in cases involving functionally described units." In my view, the asserted difference is a highly technical one, not a real one. For example, I do not think that there is a real distinction between the following unit descriptions: (1) all production and maintenance employees; and (2) all employees who perform production and maintenance functions. Apparently, if an employer creates a new classification and hires employees into it, my colleagues would apply a traditional accretion analysis in situation No. 1 and would apply their new analysis in situation No. 2. However, in both cases, a new classification is created and new employees are hired. The Section 7 rights of these employees, not a technical semantic distinction, should govern the disposition of these cases.

My colleagues assert that the parties (Employer and Union) have made their own unit description. Thus, it is said that a lesser accretion standard is warranted. However, as discussed above, the unit description is not meaningfully different from that used in more typical accretion cases. More importantly, these parties cannot, by fiat, abrogate the Section 7 rights of the employees. As to this latter point, my colleagues disagree. They say: "Had the employer voluntarily created these new classifications as unit positions, the employees' Section 7 rights would not have been at issue." Concededly, if the employer had structured the new position so that it met traditional accretion standards, the employees would have been in the unit. However, where, as here, the new positions do not meet those standards, the Board can and should vindicate the Section 7 rights of the employees.

In sum, extant law places a heavy burden on the party who wishes to add, without consent, a new classification to an extant unit. By contrast, my colleagues place the substantial burden on the party who wishes to avoid the forced representation of these employees. And, my colleagues essentially eschew the "community of interest" principles that have historically governed the resolution of unit issues. I would follow extant principles, and thereby respect the Section 7 rights of the employees.

I now apply these principles to the instant case. That application yields an easy result. My colleagues do not even assert that the new classification meets the test of "overwhelming community of interest." Thus, in agreement with the Regional Director, I would not include these employees in the extent unit without their consent.

# MEMBER BRAME, dissenting.

The question presented is whether the bargaining unit at issue here, which is defined by the work performed, should be clarified to include the creative services employees who perform certain work that falls within the unit description. Applying the Board's traditional accretion analysis, the Regional Director recommended that the Petitioner's unit clarification petition be dismissed. Creating, ex nihilo, a new legal presumption that stands the Board's traditional accretion analysis on its head, the majority reverses the Regional Director and finds that the bargaining unit should be clarified to include the creative services employees. For the reasons set out below, I dissent.<sup>1</sup>

The Regional Director has fully set out the facts. In brief, the Employer is engaged in the publication of a daily newspaper, *The Sun*, in Bremerton, Washington. For at least 30 years, the Petitioner has represented the employees in the bargaining unit at issue here. As noted

<sup>&</sup>lt;sup>1</sup> Since I find, in agreement with the Regional Director, that the creative services employees lack a sufficient community of interest with the bargaining unit employees to warrant their inclusion in the unit, I find it unnecessary to address the Employee's contention that the creative services employees are professional employees and should be excluded from the unit on that basis also

above, that bargaining unit is defined by the work performed by the unit employees. Thus, in both the prior contract between the parties, and in the present contract, whose term extends from March 1, 1987, to February 28, 1999, and which was executed on February 3, 1994, article I, section 3 provides:

Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective-bargaining unit consists of all employees performing any such work.

As explained by the Regional Director, "[h]istorically, unit employees have been the employees working in the composing room" and these employees have "historically performed certain work involved in the process of 'making up' display advertisements." Since 1990, the Employer has employed Creative Services employees in the advertising department who also perform such work, i.e., the "making up" of display advertisements. There are approximately 20 Composing Room employees and 2 Creative Services employees.

Composing room employees perform work on all the contents of every page of the newspaper. Prior to the advent of computers in 1990, the composing room employees did pasteups for the entire newspaper by hand. As one Composing Room employee testified, "[t]o fit the pages, we would cut and paste with wax and things to make them fit the space that they had agreed upon." As to the "making up" of advertising copy, the work at issue here, the witness testified that the Composing Room employees "composed ads," i.e., they received a layout from the ad salesman, would pick the type fonts, and then fit the layout into the space allotted for the advertisement. The composing room employees would take the ads "to a separate person who would put the art work and the type of ad together." After computers were introduced into the Composing Room, the witness further testified that the Composing Room employees still received layouts, but would get their art work off of CDs instead of going to another person to put in the art work. Both before and after the introduction of computers, the composing room employees continued to select-type fonts, type in the text, place pictures in the ads, and add color as requested.

As to Creative Services employees, Brenda Harford, the Creative Services manager, testified that the primary function of the Creative Services employees was to "assist the advertising department, the sales reps . . . [by] gather[ing] information through a sales rep, be it something that an account has specifically asked for, or be it something that the sales rep has determined may be a manner in which we could sell an ad to them." Harford also testified that the creative services employees take

the information given to them and "interpret that information by adding to it, basically creating. We are working from a blank space." Harford explained, however, that the degree of artistic freedom varied with the client, that while some clients entrusted the creation of the entire ad to the creative services employees except for the product to be shown, other clients gave more specific directions.

As explained above, the issue here is whether the creative services employees should be accreted into the bargaining unit because they perform certain work, i.e., the making up of advertising copy, that falls within the unit description.<sup>3</sup> Since both the Regional Director and the majority have relied on the Board's decisions in *Antelope Valley Press*, 311 NLRB 459 (1993), and *Bremerton Sun Publishing Co.*, 311 NLRB 479 (1993), decided the same day, the resolution of this unit placement issue must begin with a discussion of these two cases.

In Antelope Valley Press, supra, and Bremerton Sun, supra, the Board announced that in circumstances such as those here, where a bargaining unit is defined by the work performed and where the employer assigns such work to employees other than those currently performing it, "[t]he unit placement of such employees may be determined by the Board either in an unfair labor practice proceeding or a unit clarification proceeding."<sup>4</sup> In Antelope Valley, supra, the issue was whether the employer violated Section 8(a)(5) of the Act by bargaining to impasse and then implementing a contract proposal that permitted it to remove certain work from the bargaining unit and assign it to nonunit employees. The resolution of this issue depended on whether the employer's proposal concerned a mandatory (assignment of work) or permissive (unit scope) subject of bargaining.<sup>5</sup> The Gen-

[I]n Antelope Valley] the Board . . . formulated a new test for determining under what circumstances, if at all, a party may lawfully insist to impasse on changes in work assignments when the previously agreed-upon bargaining unit description is based on descriptions of work performed. The Board there held that when unit descriptions are couched in those terms, an employer may, after reaching impasse, insist on transferring work of a type contained within the description to employees other than those currently performing it. The employer may not, however, either change the unit description itself or insist that nonunit employees to whom the work is transferred will remain outside the unit. The unit placement of such employees may be determined by the Board either in an unfair labor practice proceeding or a unit clarification proceeding.

<sup>&</sup>lt;sup>2</sup> For ease of reference only, I shall refer to the unit as it is currently comprised as the "composing room employees."

<sup>&</sup>lt;sup>3</sup> As explained in *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 756–757 (7th Cir. 1982):

An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative.

<sup>&</sup>lt;sup>4</sup> As explained in *Bremerton Sun*, 311 NLRB at 470–471 (emphasis added):

<sup>&</sup>lt;sup>5</sup> As explained in *Antelope Valley*, 311 NLRB at 460 (footnotes omitted):

eral Counsel and the union argued that the employer's proposal was unlawful because it changed the scope of the unit, which was defined by the work performed, and was therefore a permissive subject of bargaining. The employer argued that the contract proposal was a mandatory subject of bargaining because it did not alter the scope of the unit, i.e., it did not take any work out of the bargaining unit and did not result in any loss of jobs for bargaining unit employees. Rather, the employer asserted that the new clause was necessary to provide flexibility in determining work assignments which would allow it to operate its new equipment in an economic and efficient manner.

Seeking "to accommodate both parties' interests and focus on the crux of the problem, namely, the unit placement of the employees to whom unit work is to be assigned," the Board first held that it would continue to find unlawful an employer's insistence on a contract proposal that changed the scope of the unit, even where the unit is described in terms of the work performed. *Antelope Valley*, 311 NLRB at 461. The Board further held that

[i]f the employer does not insist on changing the unit description, however, but seeks an addition to that clause that would grant it the right to transfer work out of the unit, we will find the employer acted lawfully provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit. Under this approach, the employer will be able to act to take advantage of new technology, but will not be able to decide, unilaterally, questions regarding the scope of the unit.<sup>6</sup>

The Board explained that, depending on the circumstances, the union could raise its contention that the employees performing the work after the transfer should be included in the unit either in a unit clarification proceeding or in an 8(a)(5) context. *Antelope Valley*, 311 NLRB at 461 fn. 8.

Applying the new test to the facts of the case, the Board found that the employer's impasse proposal was a mandatory subject of bargaining because, while it allowed the employer to assign specific unit work to individuals who were not included in the unit, it did not attempt to deny the union the right to contend, either in a

The assignment of work affects terms and conditions of employment, and therefore is a mandatory bargaining subject; accordingly, an employer normally may lawfully insist to impasse over a change in work assignments, even if it entails transferring work out of the bargaining unit. The scope of the unit itself, however, does not involve wages, hours, or other terms and conditions of employment, and therefore is a permissive subject. Thus, neither party may bargain to impasse over a change in the scope of the bargaining unit.

unit clarification proceeding or in an 8(a)(5) context, that the employees to whom the work was assigned should be included in the bargaining unit. The Board therefore dismissed the complaint. Importantly, and as the majority, in effect, concedes, nowhere in its decision did the Board announce, suggest, or even hint that any accretion analysis other than the Board's traditional accretion analysis, discussed below, should be utilized in deciding the unit placement of the employees to whom the work was transferred.

In Bremerton Sun, 311 NLRB 467, which involved the same parties and the same jurisdictional clause as the present case, the Board applied the "new test" announced in Antelope Valley to reach the opposite result and found that the employer violated Section 8(a)(5) of the Act. In that case, the Employer had insisted to impasse on its proposal to delete from article I, section 3, the words "[a]nd the appropriate collective bargaining unit consists of all employees performing any such work."<sup>7</sup> The Board found that the effect of this proposal was to deny the union recourse to the Board for a determination of the unit placement of the nonunit employees to whom unit work was assigned. Applying the Antelope Valley test, the Board, therefore, found that the Employer unlawfully bargained to impasse over a permissive subject of bargaining, a change in the scope of the unit. As in Antelope Valley, however, the Board neither stated, suggested, nor hinted that an analysis other than the Board's traditional accretion analysis should be applied in a unit clarification proceeding.8

Thus, it is clear that in the present case, the Regional Director's decision to apply the Board's traditional accretion analysis to decide the unit placement of the creative services employees is in accord with the Board's decisions in *Antelope Valley* and *Bremerton Sun*. For if the

<sup>&</sup>lt;sup>6</sup> Antelope Valley, 311 NLRB at 461 (footnote omitted)(emphasis added).

<sup>&</sup>lt;sup>7</sup> As set out above, art. I, sec. 3 of the prior collective-bargaining agreement provided:

Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective bargaining unit consists of all employees performing any such work.

<sup>8</sup> I agree with the majority that in cases such as Antelope Valley and Bremerton Sun, where the bargaining unit is defined by the work performed, "whether a unit is to be clarified to include certain employees initially turns on the scope of that unit." However, as explained below, this should be the analytical starting point of any unit placement analysis because without some commonality of job functions no unit placement issue would arise in the first place. I disagree with the majority's assertion that, given this analytical starting point, the Board's traditional accretion analysis must be "ill-suited to determining unit placement issues in cases involving functionally described units." As explained above, there is no language in either Antelope Valley or Bremerton Sun that would support such a contention. Nor, for that matter, can the majority cite other cases to support this position. For the reasons explained below, it is clear not only that the Board's traditional accretion analysis is not "ill-suited" to resolve the unit placement issue here, but that such an analysis is required to determine whether the creative services employees, the employees at issue here, should be accreted into the bargaining unit.

Board in these cases had contemplated that another accretion standard should apply in cases where the bargaining unit is defined by the work performed, presumably the Board would have announced that new standard in these cases. As explained below, the application of this traditional accretion analysis mandates the conclusion reached by the Regional Director, that the creative services employees do not share a sufficient community of interest with the unit employees to warrant their inclusion in the bargaining unit and that, therefore, the unit clarification petition must be dismissed.

As set out in *Compact Video Services*, 284 NLRB 117, 119 (1987), under its traditional accretion analysis:

The Board has followed a restrictive policy in finding accretions to existing units because employees accreted to an existing unit are not accorded a self-determination election and the Board seeks to insure that the employees' right to determine their own bargaining representative is not foreclosed. . . . The Board thus will find a valid accretion "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Safeway Stores*, 256 NLRB 918, 918 (1981).

To determine whether the employees to be accreted "share an overwhelming community of interest with the preexisting unit," the Board has traditionally considered the following factors: "distinctions in skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, and differences in wages and hours, as well as integration of operations, employee transfer, interchange, and contacts." *Dinah's Hotel & Apartments*, 295 NLRB 1100, 1101 fn. 3 (1989).

Applying the relevant factors here, the Regional Director found that the Creative Services employees lacked a sufficient community of interest with the unit employees to require their inclusion in the bargaining unit and concluded instead that the Creative Services employees constituted a separate appropriate unit. In reaching this conclusion, the Regional Director found that while the Composing Room employees and the Creative Services employees shared similar skills, they fulfilled different functions. The Regional Director further found that the

Composing Room employees and the Creative Services employees were separately supervised, that their work was not functionally integrated, that there was no interchange between these two groups of employees, and that any contacts between them were on a limited basis. The Regional Director further found that the wages, hours, and fringe benefits of the two groups of employees were also different. Except for the majority's assertion that the Composing Room employees and the Creative Services employees perform similar functions, 10 these findings are uncontested and require a finding that the Creative Services Employees do not share a sufficient community of interest with the unit employees to warrant their inclusion in the bargaining unit. Unable to dispute these findings, the majority, as explained below, simply asserts that they are irrelevant to its analysis of the issue presented.

To reverse the Regional Director and find that the Creative Services employees must be included in the bargaining unit, the majority applies a two-step strategy. First, purporting to find that "[n]either Antelope Valley [311 NLRB 459] nor *Bremerton Sun* [311 NLRB 479], decided how the Board should determine unit placement issues," the majority looks to "several prior cases" which, they assert, "give substantial guidance on how these matters should be decided." Relying on these cases, the majority creates its new presumption, discussed below. Second, the majority asserts that the "relevant" facts here must fit its Procrustean presumption and that those facts require a finding that the Creative Services employees must be included in the bargaining unit. For the reasons explained below, the majority decision reaches a result wrong on the facts, the law, and logic.

As to its new presumption, the majority relies on three cases, *Bay Shipbuilding Corp.*, 263 NLRB 1130 (1982), enfd. 721 F.2d 187 (7th Cir. 1983); *United Technologies Corp.*, 287 NLRB 198, enfd. 884 F.2d 1569 (2d Cir. 1989); and *Illinois-American Water Co.*, 296 NLRB 715 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991), which, it asserts, are "clearly analogous and provide useful guidelines for our analysis." Relying on these "analogous" cases, the majority creates the following accretion stan-

<sup>&</sup>lt;sup>9</sup> The Regional Director found that the Composing Room employees have and exercise skills equal to those of the Creative Services employees in using computers to prepare display advertisements and other materials. However, he also found that their work functions were different because while the Creative Services employees created display advertisements from scratch, the composing room employees worked from detailed instructions given to them by the advertising salesmen and, more generally, "continu[ed] to perform the historical functions of composing room employees in the newspaper industry."

I agree with the Regional Director that the functions of these two groups of employees are different. The decisive distinction, in my view, is that the Creative Services employees are given *information* by a sales representative and then must *create* advertisements for the sales representative to show to the clients. Only after the client approves the ad, does the advertising department send the ad *layout* to the composing room where the Composing Room employees *manipulate* the ad to fit into the space allotted for it in the newspaper. While the Composing Room employees may select, inter alia, the fonts to be used in the ad, such selection does not render the Composing Room employees' making up of ads creative work as the majority would have it. Nor can the majority, as discussed below, simply dismiss the creative work of the Creative Services employees in its attempt to make the "primary function" of the Creative Services employees fit within the unit description.

dard which it would apply in unit clarification proceedings involving bargaining units defined by the work performed:

If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or otherwise [are] an insignificant part of their work.

The majority's reliance on these "analogous" cases is misplaced and therefore its presumption based thereon must fail. For although my colleagues discuss the facts of these three cases in some detail, they simply gloss over the legal significance of the most important fact of all: that in all three cases the issue was whether the respective employers were justified in fracturing existing bargaining units by *removing* employees from the bargaining units to perform work which the employers claimed was no longer unit work because of technological changes or reorganization. An employer's legal obligations when it seeks to remove employees from a bargaining unit in such circumstances are set out in *NLRB v. Illinois-American Water Co.*, 933 F.2d at 1375:

After a bargaining unit determination, the employer is required to recognize and bargain with the union as the representative of the unit employees. NLRB v. Bay Shipbuilding Corp., 721 F.2d 187, 190 (7th Cir. 1983) . . . . As Bay Shipbuilding explains, "[t]his obligation does not expire automatically when technological innovations affect the jobs of some of the employees in the unit. Rather the employer's obligations depend on whether the changes in job structure are so significant that the existing bargaining unit, including the affected employees, is no longer appropriate." Id. When such changes occur, the burden is on the employer to show "sufficient dissimilarity" to warrant severance from the NLRB v. United Technologies bargaining unit. Corp., 884 F.2d 1569, 1572 (2d Cir. 1989) (citing Bay Shipbuilding, 263 N.L.R.B. at 1140).

Thus, in each of the cases relied on by the majority to establish its new presumption, *Bay Shipbuilding Corp., United Technologies Corp.*, and *Illinois-American Water Co.*, the burden was on the employer to show a "sufficient dissimilarity" in job structure to warrant a finding that the contested employees should be removed from the bargaining unit. In each case, the Board placed the burden on the employer to show "sufficient dissimilarity" because in each case

[t]his was not a situation where the union tried to add completely new employees into an existing unit. Instead of an accretion that interfered with the freedom of the employees to choose their own bargaining agent, the [employer] policy actually *robbed* the transferred unit employees of their chosen representation.<sup>11</sup>

Applying the "sufficient dissimilarity" analysis in each case, the Board found that the employers violated the Act by removing the employees at issue from their respective bargaining units. Significantly, the judges in *Bay Shipbuilding Corp., United Technologies Corp.*, and *Illinois-American Water Co.*, all relied on the following principle set out in *Rice Food Markets*, 255 NLRB 884 (1981), in reaching their decisions: <sup>12</sup>

When, as here, an employer attempts to justify *removing* a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently *dissimilar* from the remainder of the unit so as to warrant that removal.<sup>13</sup>

Now, under the guise of preserving bargaining stability, the majority finds that these three cases, cases which rely on the principle of "sufficient dissimilarity" and concern the *removal* of employees from a bargaining unit, are "clearly analogous" to the present case, a case in which the Union seeks to *add*, or *accrete*, new employees, the Creative Services employees, into the bargaining unit.

The majority asserts that these three cases are analogous to the present case because the issue presented here, they contend, is the same as the issue presented in those case, i.e., "whether the new jobs were sufficiently dissimilar from the jobs performed by unit employees to justify the employer's removal of the work from the unit." However, the issue in these cases and the issue in the present case are not the same. For although the majority asserts that "the principles that guided the Board and the courts in those cases [Bay Shipbuilding, United Technologies, and Illinois-American Water Co.] in deciding whether the new positions were unit positions are

<sup>13</sup> Rice Food Markets, 255 NLRB at 887 (emphasis in original). See Bay Shipbuilding Corp., 263 NLRB at 1140; United Technologies Corp., 287 NLRB at 204; and Illinois-American Water Co., 296 NLRB at 720.

<sup>&</sup>lt;sup>11</sup> NLRB v. Illinois-American Water Co., 933 F.2d at 1377 (emphasis added).

<sup>&</sup>lt;sup>12</sup> As explained in *Bay Shipbuilding Corp.*, 263 NLRB at 1139 (emphasis added):

In *Rice Food Markets, Inc.*, 255 NLRB 884 (1981), the employer converted liquor departments within grocery stores to separate liquor stores as a result of a change in state law. Employees within those departments had theretofore been part of the overall unit of grocery store employees represented by the union. After establishing the separate liquor stores and transferring liquor department employees to them, the employer thereafter refused to recognize that such employees were a part of the bargaining unit represented by the union. The Board concluded that such a change did not justify the employer in treating these employees as outside the unit. Although in that case the effected change was in the employer's method of doing business rather than in the actual job duties or tasks of employees, *the case was decided upon principles which are directly applicable to the instant situation*.

clearly relevant to resolving the analogous issue in this case[,]" the fact is that in NLRB v. United Technologies Corp., 884 F.2d at 1573, the Board argued before the court that it was unnecessary to apply a community-ofinterest analysis in that case because "[the Board] undertakes 'formal community of interest analysis' only when an employer creates a new job without eliminating or phasing out a previous unit-encompassed position." NLRB v. United Technologies Corp., 884 F.2d at 1573. Since this is precisely what has happened here, where the Employer established the Creative Services jobs without removing either employees or work from the bargaining unit, the majority's "analogy" must fail and the Board is obligated to apply a "formal community of interest analysis" here. Accordingly, contrary to the majority's assertions, the Regional Director did not err in applying such an analysis here. 14

Further, the majority's attempted analogy must also fail because the principle of bargaining stability does not drive the Board's analysis in these cases. Instead, the principle that drives both the Board's traditional accretion analysis, which I find the Regional Director correctly applied here, and the analysis of whether an employer is justified in removing employees from a bargaining unit, as set out in the three cases discussed above, is one and the same: i.e., the preservation of the employees' right to select their own bargaining representative. As to accretions, as explained above, the Board has "followed a restrictive policy in finding accretions to existing units because employees accreted to an existing unit are not accorded a self-determination election and the Board seeks to insure that the employees' right to determine their own bargaining representative is not foreclosed." Compact Video Services, 284 NLRB at 119 (emphasis added). Applying the same principle in cases where an employer, as in Bay Shipbuilding, United Technologies, and Illinois-American Water Co., seeks to remove employees from their bargaining unit, and thus to "rob" them of their chosen bargaining representative, the Board places the burden on the employer "to show 'sufficient dissimilarity' to warrant severance from the bargaining unit." NLRB v. Illinois-American Water Co., 933 F.2d at 1375. Thus, in determining whether employees should be added to or removed from a bargaining unit, the Board's analysis, up to now, has been guided by the principle that employees have the right to choose their own bargaining representative.

Today, without explanation or apology, the majority sacrifices that fundamental employee right on the altar of bargaining stability. Today, by analogical sleight of hand, the majority somehow reaches the result that the Board's traditional accretion analysis, which protects employees' freedom to choose their own bargaining representative, must give way to a presumption that new employees must be presumed to be in the bargaining unit. Today, the majority requires an employer, who previously had to show a "sufficient dissimilarity" between jobs to warrant the removal of employees from a bargaining unit, to meet that same burden to prevent their automatic addition to the unit. In sum, today the majority stands the Board's traditional accretion analysis on its head to reach a result contrary to the principles of that accretion analysis and contrary to the principles embodied in Bay Shipbuilding Corp., 263 NLRB 1133, United Technologies Corp., 287 NLRB 198, and Illinois-American Water Co., 296 NLRB 715, cases which the majority asserts are "analogous" to the present case. For the reasons set out above, I reject my colleagues' "analysis" of this issue. For the reasons explained below, I also reject their application of their new presumption to the facts of this case.

Having done away with the Board's traditional accretion analysis, the majority next asserts that under its new presumption "the threshold legal issue in this unit clarification proceeding is whether creative services employees perform work within the unit as it is defined by the parties themselves." My colleagues then find that they do because both the Creative Services employees and the composing room employees, according to the majority, work from design specifications for advertisements, i.e., the Creative Services employees work from "ad specs" supplied by salesmen, and the composing room employees work from layouts. My colleagues, then, summarily exclude from consideration, as they must, all the creative work which the Creative Services employees perform on spec ads, and simply ignore the fact that most of the composing room employees' work does not concern the preparation of advertisements, to reach the conclusion that "the fundamental nature of the functions of both Composing Room and Creative Services employees, with respect to advertisements, is the same." It is on this basis, and this basis alone, that the majority accretes the creative services employees into the bargaining unit. Even if the facts did support the majority's findings, this argument also must fail because it proves too much. 15

<sup>&</sup>lt;sup>14</sup> Since the Creative Services employees have never been included in the bargaining unit, I find disingenuous the majority's assertion that work which they perform has been removed from the bargaining unit. No employees and no work have been removed from the bargaining unit. The sole issue here is whether the Creative Services employees should be *added to* the bargaining unit.

<sup>&</sup>lt;sup>15</sup> For the reasons set out at fn. 9, above, I disagree with the majority's analysis of this issue. In particular, I find unconvincing the majority's attempt to minimize or dispose of Harford's, the Creative Services supervisor, testimony to the effect that Creative Services employees work from a "blank space." My colleagues' assertions to the contrary appear more arguments of convenience than analysis of facts. In any event, under the Board's traditional accretion analysis, which the Regional Director correctly applied here, the factor of similarity of employee skills and functions would not be of "paramount consideration" as the majority would have it, but simply one factor to consider in resolving the unit placement issue. As explained above, I find that the

Without analyzing the majority's laborious manipulation of the facts, more appropriate to the resolution of a jurisdictional dispute than a unit placement issue, the obvious point here is that of course, where, as here, nonunit employees are assigned work that in some respect falls within the bargaining unit description, there will be some similarity between certain of their functions and those of unit employees. Since this is a given, it should be the starting point of any unit placement analysis. By taking this given, the logical starting point of any analysis, and making it their analytical conclusion, my colleagues clarify only that their decision to include the creative services employees in the bargaining unit is outcome oriented and that it is driven neither by law nor logic, but only by the engine of their own presumption. Thus, for the reasons set out above, the majority's analy-

Regional Director correctly applied those factors here and that he reached the result required under that analysis.

sis of this unit placement must fail because it has no basis in logic, the law, or the facts.

Finally, if the application of the Board's traditional accretion analysis, which the Regional Director correctly applied here, requires a finding that the Creative Services employees, or any other group of employees, should not be accreted into the bargaining unit, so be it. The result is not erroneous simply because it offends the majority, and it does not justify the majority's placement of a presumptive thumb on the scales of justice to ensure a contrary outcome.

For all these reasons, I find the majority decision fails to persuade that the Regional Director erred in finding that the Creative Services employees should not be accreted into the bargaining unit. Accordingly, I would adopt his recommended Order and dismiss the unit clarification petition.